

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.615 OF 2017

IN

CRIMINAL APPEAL NO.366 OF 2017

Sunil Ganpat Suryavanshi

...

**Applicant /
Appellant**

V/s.

The State of Maharashtra & anr.

...

Respondents

.....

Mr.Aniket Vagal for the applicant / appellant.

Mr.S.V. Gavand, APP for the respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 22nd FEBRUARY 2018.

P.C. :

1. This is an application for suspension of sentence and releasing applicant on bail during the pendency of appeal filed by him.

2. The applicant / accused is convicted of offences punishable under section 6 read with section 5(m) of the Prevention of Children from Sexual Offences Act, 2012, as well as section 376 of IPC. He has been sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.1000/- and default sentence of 30 days.

3. Heard the learned Advocate appearing for the applicant/ accused.

4. By drawing my attention to answer given to question nos.49, 50, 47 and 57 by the prosecutrix / PW-1. The learned Advocate argued that this child witness is unworthy of credit because she has been tutored by her mother. The learned Advocate took me through the evidence of mother of the PW-1 viz. PW-2 Swaroopa and pointed out that this witness is not aware as to whether her statement was recorded first or whether statement of her daughter was recorded first. This witness had not read the statement of her daughter recorded by police. The learned advocate argued that PW-5 Jayashree Bodke – social worker is illiterate and though she deposed that statement of the victim was recorded in her presence, this version is not supported by either by the victim or by her mother. The learned Advocate further argued that medical evidence is not at all supporting the case of prosecution. He drew my attention to the evidence of PW-7 Dr.Rajesh Dere and argued that though the victim child was immediately examined medically, no injuries were found on her person. The learned Advocate further placed reliance on the Report of the medical examination of the prosecutrix showing that her vagina was intact and argued that final opinion was never given by the expert.

5. The learned Advocate for the applicant placed reliance on ***Sunil Bhamble vs. State of Maharashtra***¹ to buttress his submission that finding of semen stain on undergarment of the child cannot be considered as clinching evidence. With this the learned Advocate argued that the case is not even going upto the attempt to commit penetrative sexual assault even if it is accepted to be true. With this the

¹ 2016 ALL MR (Cri) 2950

learned Advocate argued that the applicant who is undergoing jail sentence from the year 2015 needs to be released on bail.

6. The learned Additional Public Prosecutor opposed the application and supported the impugned judgment and order by contending that evidence of the victim child is gaining corroboration in all material particulars.

7. I have considered the rival submissions and also perused copies of the deposition of prosecution witnesses. The victim of this crime, at the relevant time, was a child aged about 7 years. The applicant is her neighbourer and therefore she is acquainted with her. PW-2 – Swaroopa is mother of the victim child i.e. PW-1. Evidence of PW-2 – Swaroopa shows that her daughter i.e. PW-1, on 23rd April, 2015, returned home and asked her to remove her underwear and wash her. PW-2 Swaroopa questioned PW-1, but PW-1 did not give any answer. Upon removing nicker of PW-1, PW-2 Swaroopa found it smeared with the sticky white substance. Then the questioning started upon which PW-1 disclosed her mother i.e. PW-2 Swaroopa that the applicant called her inside his house poured oil on her private parts and put his male organ in her vagina.

8. After recording report, PW-1 was referred to the Lokmanya Municipal Medical College and General Hospital (Sion Hospital) for medical examination. PW-7 Dr.Rajesh Dere had medically examined her. The medical report given by this witness contains the history of the incident given by the mother as well as the victim to the medical

officer. The history recorded in the duly proved medical report is to the effect that the applicant took PW-1 inside his house removed her nicker and tried to penetrate her and he was successful in penetrating partially. The history further reflects that the applicant then ejaculated.

9. This evidence of PW-2 Swaroopa as well as evidence of PW-7 Rajesh Dere is reflecting previous statement of the victim made by her to both of them soon after the incident and the same is also reflected in contemporaneous medical record. Thus previous statements are having evidentiary value as provided in section 157 of the Evidence Act.

10. On this back ground, it is in the evidence of PW-1-the victim child that the applicant took her insider his house and removed her nicker and put oil on her vagina and put his penis insider her vagina.

11. Cross examination of PW-1 – victim child reveals that whatever she has stated was asked by her mother to state by learning it by-heart. In answer to question 57, the victim child has stated that she had been to Trombay, at that time she has disclosed as her mother told her. With this one may assumed that prosecutrix/female child has been tutored, but in answer to question no.80, the victim child has categorically stated that whatever was told by her had infact been done with her by the applicant. Hence, at this stage, it cannot be said that PW-1– minor child is a tutored witness and therefore her evidence needs to be rejected at outright.

12. As pointed out in foregoing paragraph, evidence of PW-2

Swaroopu shows that nicker of the victim child was smeared with white sticky substance. PW-6 PSI Pankaj Khairnar seized that nicker while seizure panchanama Exh.15 which was subjected to medical analysis. The report of the medical analyzer shows that the said nicker of the victim child was stained with semen.

13. It is trite that when ocular evidence and medical evidence are divergent then ocular evidence should always prevail over the medical evidence. In the case in hand, PW-7 Dr Rajesh Dere did not find any injury on person of the victim child. The offence of penetrative sexual assault or rape is complete even with slightest penetration. The rupture of hymen is not *sine qua none* for the offence of penetrative sexual assault. In case in hand, apart from the direct testimony of the victim child, there is corroborative material in the form of her previous statement as well as smearing of her nicker with semen. Hence, at this stage, it is not possible to infer that case is not that of penetrative sexual assault. In this view of the matter, cited Ruling in the matter of ***Sunil Soma Bhamble Vs. The State of Maharashtra*** is of no assistance as the case was proceeded on its own fact. In the result, no case for grant of bail is made out.

14. Application is rejected.

(A.M.BADAR J.)